No. 12732

In the United States Court of Appeals for the Ninth Circuit

HEE KEE CHUN, ADMINISTRATRIX OF THE ESTATE OF CHUN CHIN, DECEASED, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

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OPINION BELOW

The district court did not write an opinion. Its oral ruling appears in the Record at pp. 24–27.

JURISDICTION

This is an appeal from a judgment of dismissal entered September 27, 1950 (R. 22). Notice of appeal was filed October 5, 1950 (R. 23). The jurisdiction of the district court was sought to be invoked under the Tucker Act, 28 U. S. C. sec. 1346 (a) (2). The jurisdiction of this Court rests upon 28 U. S. C. sec. 1291.

QUESTION PRESENTED

Whether a person in possession of public lands of the United States under a general lease from the

Territory of Hawaii has any compensable interest in the lands or improvements thereon when the lands are withdrawn for public use by the United States, in view of the provisions of Section 91 of the Organic Act and of the lease.

STATUTE INVOLVED

The pertinent portion of Section 91 of the Hawaiian Organic Act of April 30, 1900, 31 Stat. 159, 48 U. S. C. sec. 511, is set forth in the argument, *infra,* pp. 5–6.

STATEMENT

This case is a sequel to that of *United States* v. *Chun Chin,* 150 F. 2d 1016 (C. A. 9, 1945), and involves the same question, recently determined by this Court in favor of the Government in No. 12,680, *United States* v. *A. Lester Marks, et al.* (Opinion March 5, 1951), as to whether the United States is under any liability to the holder of a general lease from the Territory of Hawaii when public lands are withdrawn from such lease for use by the United States pursuant to Section 91 of the Organic Act. The factual background is as follows:

In the latter part of 1936, Chun Chin, appellant's predecessor, and the Territory of Hawaii entered into a general lease agreement by which public lands of the United States, left in the control of the Territory by Section 91 of the Organic Act, were leased to Chun Chin for a 21-year term beginning on October 30, 1936, for use in the operation of a gasoline service station (R. 4–5, 8–14). As required by the terms of the lease, Chun Chin constructed a building on the

premises at a cost of not less than $3,000.00 (R. 5, 12). The lease contained the following provisions (R. 11, 12):

> And Also, That the Lessee shall and will at the end, or other sooner determination of the said term hereby granted peaceably and quietly yield up unto the Lessor all and singular the premises herein demised, with all erections, buildings, and improvements of whatever name or nature, now on or which may be hereafter put, set up, erected or placed upon the same, in as good order and condition in all respects reasonable use, wear, and tear excepted, as the same are at present or may hereafter be put by the Lessee.
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> * * * * *
>
> It is Mutually Agreed, That at any time or times during the term of this lease, the land demised, or any part or parts thereof, may at the option of the Lessor, on behalf of the Territory of Hawaii, or any person or persons, corporation or corporations, be withdrawn from the operation of this lease for homestead or settlement purposes, or for storing, conserving, transporting and conveying water for any purpose, or for reclamation purposes, or for forestry purposes, or for telephone, telegraph, electric power, railway or roadway purposes, or for any public purpose, or for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended, and possession resumed by the Lessor, in which event the land so withdrawn shall cease to be subject to the terms, covenants and conditions of this

lease, and the rent hereinabove reserved shall be reduced in proportion to the value of the part so withdrawn.

In 1940, the United States instituted proceedings to condemn several tracts, including the one here involved, for use in connection with the naval base at Pearl Harbor, but when it was discovered that title to the Chun Chin tract was already in the United States, the Government moved to dismiss the parcel from the condemnation proceeding. The motion was denied. *United States* v. *Chun Chin,* 150 F. 2d 1016–1017 (C. A. 9, 1945). Thereupon, the Secretary of the Navy requested that the Governor of Hawaii set aside the land for use of the Navy Department pursuant to the provisions of Section 91 of the Organic Act, and on November 18, 1943, the Governor issued an executive order complying with the request (R. 5). Shortly thereafter the parcel came on for trial in the condemnation proceeding. The Government renewed its motion for dismissal, which was denied, and judgment was entered awarding $8,500.00 as the value of the improvements. *United States* v. *Chun Chin,* 150 F. 2d 1016, 1017 (C. A. 9, 1945). On appeal this Court reversed and directed the dismissal of the parcel from the condemnation proceeding, holding that in view of the provisions of Section 91, condemnation was not an appropriate procedure for effecting a transfer of the property, and that it was unnecessary to consider whether the lessee had any right of compensation for improvements. *United States* v. *Chun Chin,* 150 F. 2d 1016, 1017–1018 (C. A. 9, 1945).

Although the parcel had been set aside for the use of the Navy Department in November 1943, Chun Chin's possession was not disturbed until August 1944 (R. 5, 6, 7), which was subsequent to the trial of, but prior to this Court's decision in *United States* v. *Chun Chin,* 150 F. 2d 1016. Chun Chin having died, appellant in the capacity of administratrix of his estate instituted this Tucker Act suit on March 31, 1949, to recover for the loss of his building, business and lease agreement (R. 3–16).

The Government moved to dismiss the complaint for failure to state a cause of action (R. 17), and Judge Metzger denied the motion without prejudice and with leave to renew the motion in another division of the court (R. 20–21). Accordingly, the Government renewed its motion before Judge McLaughlin (R. 18–19, 24–27), and on September 26, 1950, an order of dismissal was entered (R. 22). This appeal followed (R. 23).

ARGUMENT

Whatever interest was created by the lease of public lands in Hawaii, it was subject to defeasance without payment of compensation when the land was needed for purposes of the United States

Title to the lands here involved has been in the United States since annexation (see R. 4–5). As to such lands, Section 91 of the Organic Act of April 30, 1900, 31 Stat. 159, as amended, 48 U. S. C. sec. 511, provides:

> Except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii, under the

> joint resolution of annexation * * * shall remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the use and purposes of the United States by direction of the President or of the Governor of Hawaii. * * *

By direction of the Governor, the parcel was taken from the control of the Territory for the use of the United States Navy (R. 5–6).[1]

By the plain language of Section 91 and of the terms of the lease as to withdrawal (*supra,* pp. 3–4), it is clear that the United States is under no obligation to make any compensation to the holder of a general lease from the Territory when the leased lands should be retaken for federal purposes. This Court so held in *United States* v. *A. Lester Marks, et al.* (No. 12,680, March 5, 1951), and, in so holding, rejected arguments to the contrary which are substantially the same as made by appellant here. In consequence, the Government is filing herein a motion to affirm the judgment below on the basis of the decision in the *Marks* case.

Appellant contends that, even if the parcel could be withdrawn without any requirement for compensation for the land, there nevertheless was a right to compensation for the building erected by Chun Chin as required by the lease (Br. 10–15, 22–25). In the *Marks* case, this Court has already rejected such a

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[1] The Governor's order is set out in the record in *United States* v. *Chun Chin*, No. 10808, at pages 46–53.

contention by striking from the judgment an item awarding the rental value of improvements. And, in view of the lease provision for yielding up all improvements, including those erected by him, at the end or sooner determination of his lease (R. 11), it would seem that there could not be any basis for such a contention. Since the lessee clearly waived any right to remove improvements, it is plain that his only interest therein was a right of use during the existence of his lease. *Corrigan* v. *City of Chicago,* 144 Ill. 537, 549–550, 33 N. E. 746 (1893); *Mayor & C. C. of Baltimore* v. *Gamse,* 132 Md. 290, 295–296, 104 Atl. 429 (1918). Thus, when the lease was terminated by the withdrawal, all the lessee's interest in the improvements was likewise brought to an end. *United States* v. *21,815 Square Feet of Land, etc.,* 155 F. 2d 898 (C. A. 2, 1946). If it had been contemplated that in the event of a withdrawal the lessee would retain an interest in the improvements, it would have been an easy matter to provide for such an exception in the "other sooner determination" clause.

Moreover, even without consideration of the terms of the lease, it does not appear that there exists any ground for recovery by appellant. It is well established that a person erecting improvements on public lands has no rights therein when the lands are reserved for public purposes, unless he has acquired some vested right, as against the United States, in the land itself. *Russian-American Co.* v. *United States,* 199 U. S. 570 (1905). And the authorities relied upon by appellant (Br. 11–12) are not to the contrary. The statutory provision (43 U. S. C. sec.

936) is not of general application, but is a part of the Act of March 3, 1875, 18 Stat. 482, granting railroad rights-of-way over public lands.[2] And the cases cited (Br. 11) clearly recognize that Congress could have made an absolute grant to the railroads which would have wiped out the possessory claims, and hold only that in making such grants Congress required the railroads to make payment to the settlers. *Washington & Idaho Railroad* v. *Osborn,* 160 U. S. 103, 109 (1895); *Spokane Falls &c. Railway* v. *Ziegler,* 167 U. S. 65, 73 (1897); *Union Pacific R. R. Co.* v. *Harris,* 215 U. S. 386, 388–389 (1910). But they do not indicate that, absent the consent of Congress, the United States would have been required to make compensation. Neither Section 91 of the Organic Act nor any other statute imposes such a liability in the instant case.

Neither does the opinion in *Potomac Electric Power Co.* v. *United States,* 85 F. 2d 243 (C. A. D. C., 1936), certiorari denied 299 U. S. 565, offer any comfort to appellant. That part of the opinion quoted by appellant (Br. 14) refers to the ordinary right of a licensee to remove improvements that he has erected within a reasonable time after cancellation of his license. Cf. 2 Thompson on Real Property (1939), sec. 721. But here Chun Chin specifically waived all right to remove improvements and all other interest therein.

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[2] Even if it were of general application as part of the land laws of the United States, it would be of no assistance to appellant, because such laws are not applicable in Hawaii. Joint Resolution of Annexation (July 7, 1898), 30 Stat. 750, 48 U. S. C. sec. 661.

Moreover, if all interest in improvements had not terminated upon cancellation of the lease, it is plain that such termination was effected by lapse of time. The lease was cancelled by the withdrawal order of November 18, 1943 (R. 5), while the Government did not take possession until sometime in the following August (R. 6). The interval afforded ample time for the removal or salvage of the building. Clearly, such delay is fatal to the instant claim. Cf. *Maguire* v. *Gomes,* 17 Haw. 493 (1906).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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MARCH 1951.

U. S. GOVERNMENT PRINTING OFFICE: 1951